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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALAN BRINKER, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

NORMANDIN'S, a California corporation,
d/b/a NORMANDIN CHRYSLER JEEP
DODGE RAM,

Defendant.

NO.

**CLASS ACTION COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF**

DEMAND FOR JURY

Plaintiff Alan Brinker (hereinafter referred to as "Plaintiff"), by his undersigned counsel,
for this class action complaint against Defendant Normandin's d/b/a Normandin Chrysler Jeep

Dodge Ram and its present, former, or future direct and indirect parent companies, subsidiaries, affiliates, agents, and/or other related entities (hereinafter referred to as “Defendant”) alleges as follows:

I. INTRODUCTION

1. Nature of Action. Plaintiff Alan Brinker, individually and as class representative for all others similarly situated, brings this action against Defendant for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”).

II. PARTIES

2. Plaintiff Alan Brinker. Plaintiff Alan Brinker (“Plaintiff”) is a citizen of California, residing in Santa Clara County, California.

3. Defendant Normandin’s d/b/a Normandin Chrysler Jeep Dodge Ram. Normandin’s d/b/a Normandin Chrysler Jeep Dodge Ram (“Defendant”) is a California corporation with its principal place of business in San Jose, California. Defendant is registered to do and is doing business in California.

III. JURISDICTION AND VENUE

4. Subject Matter Jurisdiction. This Court has subject matter jurisdiction over Plaintiff’s TCPA claims pursuant to 28 U.S.C. § 1331 because Plaintiff’s TCPA claims arise under the laws of the United States, specifically 47 U.S.C. § 227.

5. Personal Jurisdiction. This Court has personal jurisdiction over Defendant because it is a California corporation, does business in California, and the wrongful acts alleged in this Complaint were committed in California.

6. Venue. Venue is proper in this District pursuant to: (1) 28 U.S.C. § 1391(b)(1) in that Defendant resides in this District and does sufficient business in this District to subject it to personal jurisdiction herein; and (2) 28 U.S.C. § 1391(b)(2) in that a substantial part of the events or omissions given rise to Plaintiff’s claims occurred in this District.

IV. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 47 U.S.C. § 227

7. In 1991, Congress enacted the TCPA in response to a growing number of consumer complaints regarding certain telemarketing practices.

8. The TCPA makes it unlawful “to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone service.” *See* 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA provides a private cause of action to persons who receive calls in violation of 47 U.S.C. § 227(b)(1)(A). *See* 47 U.S.C. § 227(b)(3).

9. Federal Communication Commission (“FCC”) promulgated regulations “generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.” *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum and Order, 10 FCC Rcd. 12391, 12397 ¶ 13 (1995).

10. The FCC confirmed this principle in 2013, when it explained that “a seller may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers.” *See In the Matter of the Joint Petition Filed by Dish Network, LLC*, 28 F.C.C. Rcd. 6574 (2013).

V. FACTUAL ALLEGATIONS

11. Defendant owns and operates an automobile dealership in San Jose, California, doing business as Normandin Chrysler Jeep Dodge Ram.

12. In addition to selling and leasing new and used automobiles, Defendant’s website explains that their “services include trusted Chrysler Jeep RAM and Dodge car repair” and offers “original Chrysler Jeep RAM and Dodge parts.” *See* <http://www.normandinchryslerjeep.net/dealership/about.htm> (last visited April 16, 2014).

13. On or around March 2014, Plaintiff received a telephone call from or on behalf of Defendant on his cellular telephone.

1 14. The call consisted of a prerecorded message which provided:

2 Hello. I'm calling on behalf of Normandin Chrysler Jeep Dodge.
3 Our records show that you may have missed routine maintenance
4 that is recommended for your vehicle. Proper maintenance of your
5 vehicle is recommended by your manufacturer to insure its
6 performance and longevity. If we can answer any questions
 regarding your vehicle's maintenance needs please contact us at
 (408) 266-9500. Thanks very much and have a great day.

7 15. The prerecorded message did not specify which of Plaintiff's vehicles was
8 allegedly in need of routine maintenance.

9 16. Plaintiff did not provide prior express consent to receive prerecorded telephone
10 calls on his cellular telephone from or on behalf of Defendant.

11 17. Defendant is responsible for making the above-described automated call.

12 18. Defendant has made a large number of automated and/or prerecorded calls to
13 persons in California and throughout the United States.

14 19. Defendant intends to continue to make similar automated and/or prerecorded calls
15 to persons on their cellular telephones in California and throughout the United States.

16 **VI. CLASS ACTION ALLEGATIONS**

17 20. Class Definition. Pursuant to CR 23(b)(2) and (b)(3), Plaintiff brings this case as
18 a class action on behalf of a National Class as defined as follows:

19 All persons in the United States to whom: (a) Defendant and/or a
20 third party acting on Defendant's behalf, made one or more non-
21 emergency telephone calls; (b) promoting Defendant's goods or
22 services; (c) to their cellular telephone number; (d) through the use
23 of an automatic telephone dialing system or an artificial or
 prerecorded voice; and (e) at any time in the period that begins
 four years before the date of filing this Complaint to trial.

24 Excluded from the Class are Defendant, any entity in which Defendant has a controlling interest
25 or that has a controlling interest in Defendant, and Defendant's legal representatives, assignees,
26 and successors. Also excluded are the judge to whom this case is assigned and any member of
27 the judge's immediate family.

1 21. Numerosity. The Class is so numerous that joinder of all members is
 2 impracticable. On information and belief, the Class has more than 100 members. Moreover, the
 3 disposition of the claims of the Class in a single action will provide substantial benefits to all
 4 parties and the Court.

5 22. Commonality. There are numerous questions of law and fact common to Plaintiff
 6 and members of the Class. These common questions of law and fact include, but are not limited
 7 to, the following:

8 a. Whether Defendant and/or its affiliates, agents, and/or other persons or
 9 entities acting on Defendant's behalf violated 47 U.S.C. § 227(b)(1)(A) by making any call,
 10 except for emergency purposes, to a cellular telephone number using an ATDS or artificial or
 11 prerecorded voice;

12 b. Whether Defendant and/or its affiliates, agents, and/or other persons or
 13 entities acting on Defendant's behalf knowingly and/or willfully violated 47 U.S.C.
 14 § 227(b)(1)(A) by making any call, except for emergency purposes, to a cellular telephone
 15 number using an ATDS or artificial or prerecorded voice, thus entitling Plaintiff and the Class to
 16 treble damages;

17 c. Whether Defendant is liable for ATDS generated and/or automated or
 18 prerecorded calls promoting Defendant's products and/or services made by Defendant's
 19 affiliates, agents, and/or other persons or entities acting on Defendant's behalf;

20 d. Whether Defendant and/or its affiliates, agents, and/or other persons or
 21 entities acting on Defendant's behalf should be enjoined from violating the TCPA in the future.

22 23. Typicality. Plaintiff's claims are typical of the claims of the Class. Plaintiff's
 23 claims, like the claims of Class arise out of the same common course of conduct by Defendant
 24 and are based on the same legal and remedial theories.

25 24. Adequacy. Plaintiff will fairly and adequately protect the interests of the Class.
 26 Plaintiff has retained competent and capable attorneys with significant experience in complex
 27 and class action litigation, including consumer class actions and TCPA class actions. Plaintiff

1 and his counsel are committed to prosecuting this action vigorously on behalf of the Class and
2 have the financial resources to do so. Neither Plaintiff nor his counsel have interests that are
3 contrary to or that conflict with those of the proposed Class.

4 25. Predominance. Defendant has engaged in a common course of conduct toward
5 Plaintiff and members of the Class. The common issues arising from this conduct that affect
6 Plaintiff and members of the Class predominate over any individual issues. Adjudication of
7 these common issues in a single action has important and desirable advantages of judicial
8 economy.

9 26. Superiority. A class action is the superior method for the fair and efficient
10 adjudication of this controversy. Classwide relief is essential to compel Defendant to comply
11 with the TCPA. The interest of individual members of the Class in individually controlling the
12 prosecution of separate claims against Defendant is small because the damages in an individual
13 action for violation of the TCPA are small. Management of these claims is likely to present
14 significantly fewer difficulties than are presented in many class claims because the calls at issue
15 are all automated. Class treatment is superior to multiple individual suits or piecemeal litigation
16 because it conserves judicial resources, promotes consistency and efficiency of adjudication,
17 provides a forum for small claimants, and deters illegal activities. There will be no significant
18 difficulty in the management of this case as a class action.

19 27. Injunctive and Declaratory Relief Appropriate. Defendant has acted on grounds
20 generally applicable to the Class, thereby making final injunctive relief and corresponding
21 declaratory relief with respect to the Class appropriate on a classwide basis. Moreover, on
22 information and belief, Plaintiff alleges that the automated calls made by Defendant and/or its
23 affiliates, agents, and/or other persons or entities acting on Defendant's behalf that are
24 complained of herein are substantially likely to continue in the future if an injunction is not
25 entered.

VII. FIRST CLAIM FOR RELIEF
(Violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A) – Cellular Telephone Calls)

28. Plaintiff realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

29. The foregoing acts and omissions of Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf constitute numerous and multiple violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except for emergency purposes, to the cellular telephone numbers of Plaintiff and members of the Class using an ATDS and/or artificial or prerecorded voice.

30. As a result of Defendant's and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf's violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), Plaintiff and members of the Class presumptively are entitled to an award of \$500 in damages for each and every call to their cellular telephone numbers using an ATDS and/or artificial or prerecorded voice in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

31. Plaintiff and members of the Class are also entitled to and do seek injunctive relief prohibiting Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf from violating the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except for emergency purposes, to any cellular telephone numbers using an ATDS and/or artificial or prerecorded voice in the future.

VIII. SECOND CLAIM FOR RELIEF
(Knowing and/or Willful Violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A) – Cellular Telephone Calls)

32. Plaintiff realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

33. The foregoing acts and omissions of Defendant and/or its affiliates, agents, and/or other persons or entities acting on Defendant's behalf constitute numerous and multiple knowing and/or willful violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except for

1 emergency purposes, to the cellular telephone numbers of Plaintiff and members of the Class
2 using an ATDS and/or artificial or prerecorded voice.

3 34. As a result of Defendant's and/or its affiliates, agents, and/or other persons or
4 entities acting on Defendant's behalf's knowing and/or willful violations of the TCPA, 47 U.S.C.
5 § 227(b)(1)(A), Plaintiff and members of the Class are entitled to treble damages of up to \$1,500
6 for each and every call to their cellular telephone numbers using an ATDS and/or artificial or
7 prerecorded voice in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

8 35. Plaintiff and members of the Class are also entitled to and do seek injunctive
9 relief prohibiting Defendant and/or its affiliates, agents, and/or other persons or entities acting on
10 Defendant's behalf from violating the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except
11 for emergency purposes, to any cellular telephone numbers using an ATDS and/or artificial or
12 prerecorded voice in the future.

13 **IX. PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff, on his own behalf and on behalf of the members of the Class,
15 prays for judgment against Defendant as follows:

- 16 A. Certification of the proposed Class;
- 17 B. Appointment of Plaintiff as representative of the Class;
- 18 C. Appointment of the undersigned counsel as counsel for the Class;
- 19 D. A declaration that Defendant and/or its affiliates, agents, and/or other related
20 entities' actions complained of herein violate the TCPA;
- 21 E. An order enjoining Defendant and/or its affiliates, agents, and/or other related
22 entities, as provided by law, from engaging in the unlawful conduct set forth herein;
- 23 F. An award to Plaintiff and the Class of damages, as allowed by law;
- 24 G. An award to Plaintiff and the Class of attorneys' fees and costs, as allowed by law
25 and/or equity;
- 26 H. Leave to amend this Complaint to conform to the evidence presented at trial; and
27

1 I. Orders granting such other and further relief as the Court deems necessary, just,
2 and proper.

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4 **X. DEMAND FOR JURY**

Plaintiff demands a trial by jury for all issues so triable.

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6 RESPECTFULLY SUBMITTED AND DATED this 1st day of July, 2014.

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